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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Nos. 76-1471, 76-1521, 76-1595,
76-1604, 76-1624, and 76-1685

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

CHANNEL TWO TELEVISION COMPANY, *et al.*, *Petitioners*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

AMERICAN NEWSPAPER PUBLICATIONS ASSOCIATION, *Petitioner*,

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NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

ILLINOIS BROADCASTING CO., INC., *et al.*, *Petitioners*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

POST COMPANY, *et al.*, *Petitioners*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ILLINOIS BROADCASTING CO., INC.
AND LINDSAY-SCHAUB NEWSPAPER, INC.
PETITIONERS IN NO. 76-1624

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No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, *Petitioner*,

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NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1624

ILLINOIS BROADCASTING CO., INC., *et al.*, *Petitioners*,

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NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

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PETITIONERS IN NO. 76-1624

OPINIONS BELOW

The opinion of the District of Columbia Circuit Court of Appeals is reported at 555 F.2d 938. It is printed in the Appendix (A. 339-431). The *per curiam* opinion of the court of appeals (as amended, see A. 26) which accompanied its order granting a partial stay of mandate on April 5, 1977, is reported at 555 F.2d 967, and is also printed in the Appendix (A. 435-444). The *Second Report and Order* of the Federal Communications Commission is reported at 50 F.C.C. 2d 1046 (1975) and its *Memorandum Opinion and Order* denying petitions for reconsideration at 53 F.C.C. 2d 589 (1975). They are printed in the Appendix (A. 134-316 and A. 317-338, respectively).

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1977 (A. 432-434). On April 5, 1977 the court of appeals filed its opinion and order, *supra*, on the motion of the Federal Communications Commission for stay of mandate, partially staying the mandate (A. 435-444).

The Petition for Writ of Certiorari in No. 76-1471 was filed on April 22, 1977; in No. 76-1521 on May 2, 1977; in No. 76-1595 on May 13, 1977; in No. 76-1604 on May 16, 1977; in No. 76-1624 (the within petitioners') on May 20, 1977; and in No. 76-1685 on May 27, 1977. The Petitions for Writ of Certiorari were granted October 3, 1977 (____ U.S. ____).

The jurisdiction of this Court in each case is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Communications Commission adopted rules concerning co-ownership of AM, FM or TV broadcast stations and a daily newspaper in the same community. The rules barred the future establishment of such joint newspaper-broadcast ownerships, but ordered divestiture of only a few existing combinations (where the same party owned or controlled the only daily newspaper and only television station or, if no local television station, the only radio station). Upon review of the Commission action, the Court of Appeals for the District of Columbia Circuit reversed and remanded the matter to the agency, and directed the Commission to achieve full scale divestiture. The questions presented are:

1. Whether a ban against common ownership of a daily newspaper and an existing broadcast station, even in a community in which there are other broadcast stations, separately owned, is required by the First Amendment to the Constitution and the Communications Act, as the court of appeals directed the agency to conclude.

2. Whether the court of appeals exceeded its proper role of review under Section 402(a) of the Communications Act of 1934, as amended, by substituting its judgment for that of the Commission in the agency rule making proceeding, in directing the Commission to adopt a broadcast licensing policy to break up all situations of common ownership of daily newspapers and broadcast stations in the same community, including radio (AM and FM) — newspaper situations which were marginally stated in the opinion which considered diversity factors only in connection with newspaper-television co-ownerships.

STATUTES AND REGULATIONS INVOLVED

1. The relevant provisions of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. 151 *et seq.*), Sections 303, 307(a), 309(a), and 402(a) (47 U.S.C. §§ 303, 307(a), 309(a) and 402(a)), are printed in the Appendix (A. 27-32).

2. The Commission regulations under review appear in identical text as §§ 73.35, 73.240 and 73.636 of the Commission's Rules and Regulations governing, respectively ownership of AM, FM and TV broadcast stations (47 C.F.R. §§ 73.35, 73.240, 73.636). The text of the rules is printed in the Appendix (A. 243-263).

STATEMENT

These cases involve the constitutional validity of the proposition announced by the court of appeals that the Federal Communications Commission is required to adopt rules barring common ownership in the same community of a daily newspaper and a broadcast station and to apply such rules retroactively to require the break up of previously approved, long established cross-ownership newspaper broadcast situations, even where there are other broadcast stations in the city of the commonly owned newspaper/broadcast station.¹

1. The Administrative Background.

The broadcast/newspaper ownership rules which are in issue here, had their inception in an FCC rule making

¹ The Commission had "grandfathered" most existing newspaper-broadcast situations until voluntary sales, for example, when the new rules would come into play and preclude continuation of, or establishment of, a new broadcast-newspaper co-ownership.

proceeding which commenced in 1968.² Then the Commission proposed to adopt rules looking toward a prohibition against the establishment of commonly owned TV, AM and FM stations in the same market. Prospective bars only were signalled; forced divestiture of the many existing TV, AM and/or FM common ownerships was not then proposed. After two years of consideration, that phase of the proceeding was concluded with the adoption of rules, applicable on a prospective basis only and limited to co-ownership of a VHF television station and either an AM or FM station in the same city, barring such new combinations. AM-FM common ownerships were not proscribed. Television stations in the UHF band combined with either or both AM and FM stations in the same city were to be considered separately, as such new applications might arise.³

With that, and simultaneously, the Commission issued a Further Notice of Rule Making to consider whether the prospective VHF TV-radio combination bar should be applied retroactively to require the break up of existing combinations and whether common ownership of a daily newspaper and a broadcast station in the same community should be proscribed.⁴ This second

²*Multiple Ownership of Standard, FM and Television Broadcast Stations*, Notice of Proposed Rule Making, 33 F. Reg. 5315 (1968), summarized in First Report and Order, Footnote 3, *infra*, at A. 33-36.

³*Multiple Ownership of Standard, FM and Television Broadcast Stations*, First Report and Order, 22 FCC 2d 306 (1970). (A. 33-100).

⁴*Multiple Ownership of Standard, FM and Television Broadcast Stations*, Further Notice of Proposed Rule Making, 22 FCC 2d 339 (1970). (A. 101-126).

stage commenced in 1970, and the administrative proceeding spanned five years. A substantial record was developed, with broadcast-newspaper owners,⁵ industry associations and such groups as respondent NCCB actively participating.

On January 31, 1975 the Commission concluded its rule making proceeding with a report and order,⁶ adopting the prospective broadcast/newspaper ownership rules and ordering the limited number of divestitures above referred to. No divestitures of combination broadcast ownerships (TV, AM or FM, however combined without newspapers) was ordered. The Commission found that there were significant public interest reasons for "grandfathering" most of the existing newspaper-broadcast ownerships (which it acknowledged it had encouraged in establishment), although changed circumstances did warrant a different

⁵ For example, petitioner Illinois Broadcasting Co., Inc. is a long time operator of stations WSOY and WSOY-FM in Decatur, Illinois. Various stockholders of the broadcast company own directly and indirectly the stock of petitioner Lindsay-Schaub Newspapers, Inc., the publisher of daily newspapers in Decatur (*Herald and Review*). In the FCC rule making proceeding it was shown that when Illinois Broadcasting acquired its AM station it was of low power and sharing time with a Bloomington, Illinois station. The station was in financial distress. The station employed only two technicians and was without any news department when acquired. Petitioner Illinois Broadcasting showed improvements in the station's technical facilities, frequency utilization and the establishment of a radio news department under a full-time news editor with journalism experience.

⁶ *Multiple Ownership of Standard, FM and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046 (1975), reconsideration denied, 53 FCC 2d 589 (1975). Printed in full at A. 134-316 and A. 317-338.

policy for the future, and thus the rules to preclude the establishment of new broadcast/newspaper combinations.⁷

2. The Appellate Review.

Appellate review of the Commission's newspaper-broadcast rules⁸ was sought by a number of parties, pursuant to Section 402(a) of the Communications Act (47 U.S.C. §402(a)), with intervenors on the various petitioners' sides. Those seeking review were, broadly, in three groups. In the first group were those subject to divestiture in the so-called media monopoly market situations. Then came various broadcast and newspaper owners, the newspaper publishers' association (ANPA) and the radio-television trade association (NAB), who addressed both the limited divestiture requirement and the prospective ban anent new newspaper-broadcast combinations. The third group is the lead respondent in this Court, the self-styled National Citizens Committee for Broadcasting and other ad hoc committees, which challenged the Commission's order as insufficient in not requiring an across-the-board divestiture. They focused, however, only on television-newspaper combinations.

⁷The within petitioners do not concede that divestiture should be approved in any situation simply on the grounds that the broadcast station is owned by a newspaper or vice versa; however, the direction of the court of appeals to the Commission which affects the petitioners are those portions which would require a break up of radio and newspaper ownership even in such markets as Decatur, Illinois where there are other separately owned media outlets, accordingly, the emphasis of petitioners' brief is on the errors in that aspect of the lower court's decision.

⁸The "no break up" of existing TV-AM/FM situations was not challenged.

The Department of Justice, as a statutory respondent below, urged the appellate court to affirm those portions of the Commission's newspaper/broadcast rules which prohibited the creation of new common ownership situations, but asked that the portions of the rules with respect to the existing cross-interest situations be vacated and remanded for further agency consideration. Here, too, the arguments were made in context of television-newspaper situations and not radio-newspaper co-ownerships.⁹

The court of appeals affirmed the Commission's prospective cross-ownership ban. It opined that the legislative type policy judgment to be implemented by the new rules was supportable by the high place in the public interest quotient of the Communications Act occupied by the diversity of viewpoints proposition¹⁰ and not constitutionally interdicted by the First Amendment. It pointed to judicial approval of earlier FCC rules limiting broadcast license holdings (*United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956)). From there the appellate court vaulted to a proposition that the public interest standard of the Communications Act and the implications of the First Amendment required the Commission to adopt a policy of giving diversity of media ownership controlling weight in licensing broadcast stations. The lower court held that the Commission erred because, having attempted to promote diversity through the prospective ban against

⁹ See excerpts from both NCCB's and the Department of Justice's briefs printed in the Appendix to the Petition for Writ of Certiorari in No. 76-1624, as Appendix B at pp. 5a-8a.

¹⁰ Citing and quoting from, for example, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

the creation of new newspaper-broadcast co-ownerships in the same market, it failed to go further and order full scale divestiture under what the court said was a Communications Act and First Amendment "presumption against cross ownership" (A. 426, 431)¹¹

The court disparaged each of the policies and values which the agency had found, on the basis of the record in the rule making proceeding and its experience administering the Communications Act, countervailed an across-the-board divestiture. Local ownership was dismissed as "of little concern to the Commission" (A. 420), or, in the court's view, a factor which it would not suppose would be reduced by breaking up local newspaper-broadcast cross-ownership situations (A. 421). The loss of continuity of operation, was counted of little significance (A. 423). The Commission's findings that existing cross-ownership situations involving newspapers and television stations have produced superior programming were rejected, not on the basis of the findings being without support in the record, but rather because, as the Court said, "the Commission *did not stress* (emphasis supplied) this superiority in deciding to grandfather most stations" and "comparing amounts of programming types aired . . . would . . . seem to be a crude measure of the public interest". (A. 399). Only diversity of ownership should be considered, said the court; all the rest are "lesser policies" (A. 427). Thus, the across-the-board divestiture by co-located newspaper-broadcasting stations was required, the court told

¹¹With the possibility, perhaps, of a waiver of the break-up requirement in a given situation, but without the newspaper/broadcast station's financial or personal interests cognizable as a waiver factor (A. 424).

the Commission. And, although the court drew its case for the presumption against broadcast/newspaper ownership in terms of television and newspapers as major information and viewpoint outlets, by a marginal note it ordered the Commission to include AM and FM stations in the divestiture.¹²

The court of appeals also found that the Commission was arbitrary and capricious in distinguishing between the "egregious" mass media monopoly situations (where the FCC had ordered divestiture) and other communities where the newspaper-broadcast owners faced competition. In the court's view, it was irrational for the Commission to conclude that the existence of an effective monopoly could control, and rather, so "that everyone would be consistently treated" the Commission's limited divestitures were set aside and the agency was directed to adopt an across-the-board divestiture rule, subject to waiver only in exceptional circumstances (A. 443).

After the release of the court's opinion, the Commission moved to stay the mandate (see A. 25 and A. 438). The court stayed its mandate "only insofar as it applies to the Commission's grandfathering rules" (A. 444), on the understanding that the Commission would file for *certiorari*. In its *per curiam* opinion and order, the court of appeals reiterated that its "policy" in this diversity/divestiture field was that diversification of media ownership is of controlling weight and the

¹²In addition to the newspaper-television regulations, 47 C.F.R. §73.636(c), which form the heart of this case, the Commission also promulgated similar regulations regarding newspaper-radio station combinations. * * * Our decision, therefore, will pertain equally to both sets of regulations." (A. 346-347, footnote 1).

Commission was required to follow that "court-approved policy" and adopt a rule providing for across-the-board divestiture (A. 442-443).

SUMMARY OF ARGUMENT

The Court of Appeals made two basic errors in directing the Commission to adopt rules which would require the break up of every co-located newspaper/broadcast combination without regard to the number of other media outlets which might be present in the affected community. The errors are interwoven in the directions to the agency, but can be examined in two discrete parts. First, the lower court elevated the Commission's authority to consider diversity of viewpoints in assigning relatively scarce broadcast outlets from a permissible, judicially approved diversity policy to a required divestiture proposition mandated by the First Amendment and the Communications Act. The court of appeals opined that the *prospective* ban against a radio license being granted to an applicant with a newspaper in the city in which the station would be located, was a permissible licensing policy, and not a prior restraint on the broadcast applicant nor a bar against the newspaper's First Amendment expression rights. It then extended that view to the point of telling the Commission that it must break up long established, previously approved, and even encouraged situations of common ownership of a newspaper and a broadcast station. The error here lies in the court's reasoning that if the public interest standard of the Communications Act permits a consideration of the relative scarcity of frequencies to justify a numerical limitation on the number of stations one individual could control, *U.S. v. Storer Broadcasting*, 351 U.S. 192 (1956), then the

same authority requires a radio station to be taken away from a party who has a newspaper outlet, or vice versa, in the same city. What may be permissible, must be required in the name of diversity, the court opined, although it did note there may be some limits since "[t]he *Red Lion Court*¹³ carefully withheld approval from rules that would more directly interfere with the broadcasters' First Amendment rights. . . ." (A. 371-372).

Then, having created a presumption against broadcast-newspaper ownership, (to justify the limited divestiture cases ordered by the FCC), the court ordered the agency to apply the presumption across-the-board, thus dictating divestiture in every market. And here lies the second area of error. Rather than merely reversing the Commission and remanding the matter, the lower court's opinion leaves the FCC little doubt that it must adopt the court's "presumption" against any cross interest. The court's opinion forecloses the Commission from weighing, in such situations, other public interest licensing factors, including the all important one of service to the public. The lower court did not merely correct errors of law (assuming, *arguendo*, there were any); it commanded adoption of its own views, contrary to *U.S. v. Saskatchewan Minerals*, 385 U.S. 94 (1966) and *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

Instead of invalidating the FCC's "grandfather" provisions on the basis of a newly found presumption against newspapers owning radio stations, or vice versa,

¹³ *Red Lion Broadcasting Co.*, footnote 8, *supra*, 395 U.S. at 367.

the court below should have allowed the rule to operate. In remanding the matter to the Commission, it should have permitted the agency to fill out interstices, if any. "...[T]he construction of a statute by those changed with its execution should be followed unless there are compelling indications that it is wrong". *Red Lion*, *supra* (395 U.S. at 381).

ARGUMENT

I.

THE LOWER COURT ERRONEOUSLY TRANSLATED THE IMPORTANCE OF DIVERSITY OF VIEWPOINTS UNDER THE FIRST AMENDMENT AND THE COMMUNICATIONS ACT TO A CONSTITUTIONAL AND STATUTORY BAN AGAINST NEWSPAPER AND BROADCAST CROSS-OWNERSHIP INTERESTS.

An important objective of the First Amendment to the Constitution is that of preserving "an uninhibited market place of ideas in which truth will ultimately prevail . . .", *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). The Communication Act's standard of "public interest, convenience or necessity"¹⁴ permits the promulgation of reasonable rules by the Commission limiting the number of broadcast stations which may be held by a single entity or group related through cross-ownership of broadcast stations. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1955). The

¹⁴ §§ 303, 307(a), 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 303, 307(a), 309(a) make it constitutionally permissible for the Commission to allocate broadcast channels so as to "render the best practical service to the community reached" (*National Broadcasting Co. v. U.S.*, 319 U.S. 190, 212, 213 (1943), quoting from *F.C.C. v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1949)).

general principal derived from these propositions was assigned a high place in the Commission rule making proceedings which resulted in a new rule banning the establishment, in the future, of broadcast stations by newspapers, or the acquisition of a newspaper in its city of license by a broadcast station.¹⁵ But the court of appeals elevated these considerations which might authorize the Commission to limit licensing of broadcast facilities to newspapers in the future to a presumption against the continuation of all such ownerships in the same community. In effect the court of appeals concluded that what the Constitution may permit, it expressly commands; what the Communications Act may authorize the Commission to do, it directs the Commission to do. And there lies the court's error.

Unlike other media of expression, broadcasting is "inherently not available to all", *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943). Because of this characteristic, broadcasters have long been subjected to governmental regulations in the public interest. They are required to present opposing views on public issues under the so-called Fairness Doctrine.¹⁶ *Red Lion Broadcasting, supra*. With this

¹⁵The rules against granting a license to a party with same city daily newspaper interests are in terms of the ownership composition of the license applicant. The rules bar a newspaper from acquiring a broadcast station. However, if a broadcast station acquires a newspaper during a license term (three years), the newspaper ownership would disqualify it from the renewed grant of the license, so the ban works both ways.

¹⁶"... to afford reasonable opportunity for the discussion of conflicting views on issues of public importance". Section 315(a)(4) of the Communications Act, 1959 amendment, 73 Stat. 557.

safeguard, the service rendered by a station continues to be the ultimate test of "public interest",¹⁷ and not the broadcast/paper ownership interests, particularly on this record where the Commission concluded against wholesale divestiture of existing situations of co-ownership.

The most important element of any licensing policy of the FCC under the Communications Act, namely the service which is rendered by a station, would be written out of consideration by the court. "With everybody on the air", wrote Mr. Justice Frankfurter for this Court thirty four years ago, "nobody could be heard". * * * [T]he radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore . . . vital to its development. . . ." *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 212-213 (1943). And, with the interference and scarcity factors, this Court did not restrict the Commission to the role of a "traffic officer policing the wavelengths to prevent stations from interfering with each other" (319 U.S. at 215), but held that it was constitutionally permissible to allocate channels to "'render the best practical service to the community reached'" (quoting from *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1949)). And see *Red Lion Broadcasting Co.*

¹⁷ See, for example, *NAACP v. Federal Power Commission*, 425 U.S. 662, 670 (1976), where (n. 7) this Court referred to the FCC's regulations concerning employment discrimination by broadcasters, and noted their justification insofar as they are "necessary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups".

v. F.C.C., 395 U.S. 367, 394 (1969). But the court of appeals would apply those cases to require the suppression of newspaper ownership by a broadcast station owner in a market with many otherwise-owned radio and TV stations (and often other newspapers, too).

Whatever might be said about a licensing policy under the Communications Act which includes a factor of determining the effect *vel non* on the whole public interest quotient of an applicant's other media interests, it is quite another thing to say, as the court of appeals would do, that the FCC must interpret the Communications Act to require a radio station to dispose of a newspaper in its community of license, or lose its broadcast license. In another light, the requirement for divestiture would be laid upon the newspaper and it could continue its free speech right of publication only upon the condition of getting rid of its radio station. In either vein, the co-located newspaper/broadcast station owner's First Amendment rights would be infringed within the depth of such Constitutional protection outlined by this Court in *Miami Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

Although the court below noted that "[t]he *Red Lion* Court carefully withheld approval from rules that would more directly interfere with the broadcasters' First Amendment rights . . ." (A. 371-372), it misconstrued and misapplied this Court's decision in *Red Lion* to require divestiture, even in multi-media access communities and without regard to the service provided by the station[s]. This was contrary to this Court's statement in *NBC, supra*, that "[s]ince the very inception of federal regulation by [sic] radio, com-

parative considerations as to the service to be rendered have governed the application of the standards of 'public interest, convenience, or necessity'" (319 U.S. at 217).

The nub of the lower court's decision which necessitates revision by this court, is the holding that the First Amendment objectives of preserving "an uninhibited market place of ideas in which truth will ultimately prevail . . .", *Red Lion Broadcasting Co. v. FCC*, *supra*, and the standard of "public interest, convenience or necessity" of the Communications Act require the FCC to accomplish across-the-board divestiture, simply because it may, in allocating broadcast facilities, take diversity of ownership into account. It is submitted that the lower court's newly found presumption should be struck down.

II.

THE COURT OF APPEALS SUBSTITUTED ITS OWN VIEWS FOR THE COMMISSION'S JUDGMENT IN A POLICY AREA, DEPARTING FROM THE PROPER ROLE OF AN APPELLATE COURT IN REVIEWING AGENCY RULEMAKING.

The lower court held that the *prospective* ban against a radio license to an applicant with a newspaper in the city in which the station would be located was a permissible licensing policy of the Commission. It concluded that such action was not a prior restraint on the broadcast applicant nor a bar against the newspaper's First Amendment expression rights. But then it extended that view to require the Commission to force the break-up of existing, long-approved newspaper-broadcast combinations. The court thus exceeded the boundaries of appropriate judicial review in agency rule

making proceedings. The Commission had balanced the various factors in the "public interest" standard of the Communications Act and fairness to the broadcasters in permitting "grandfathering". The Commission had also weighed all the policy factors lying between no ban against newspaper ownership at all to a prospective ban; from permitting the continuation of the long-established co-ownership situations (except in the "egregious" situations of no effective competition) to an across-the-board divestiture. The court, however, supplanted the Commission's fine balancing, and ordered a complete ban, with divestiture. This, in our view, was contrary to the permissible judicial review role in such case. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943), *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

Constitutional and statutory considerations underlying the court's newly found presumption against broadcast ownership aside, rather than merely reversing the Commission and remanding the matter,¹⁸ the opinion leaves the agency little doubt that it must adopt the court's presumption without any weighing of other public interest licensing factors. The lower court did not merely correct errors of law (assuming, *arguendo*, there were any), it commanded adoption of its own views, contrary to this Court's teachings in such cases as *U.S. v. Saskatchewan Minerals*, 385 U.S. 94 (1966) and *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).¹⁹

¹⁸See 5 U.S.C. § 706(2)(a).

¹⁹Citing, *e.g.*, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

The petitioners recognize that upon a review in a case such as this, the court of appeals may correct errors of law and on remand the Commission would be bound to act upon the correction. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140 (1940). However, this principle does not permit the court "as an indirect result of its power to scrutinize legal errors" (*Ibid.*) to direct the Commission as to the determinative role to be assigned to diversity of ownership in assaying existing broadcast services in such communities as those represented by the petitioners here, where there are other, separately owned broadcast and CATV outlets.

The petitioners, with cross-ownership interests in the newspaper in Decatur, Illinois and radio stations WSOY and WSOY-FM, have operated the broadcast stations for almost four decades. The stations' records have been reviewed tri-annually by the Commission, when the licenses have been submitted for renewal. No showing of any mis-use of the cross ownership of the Decatur daily newspaper was ever developed in those proceedings, nor on the record in this rulemaking proceeding before the FCC. On the other hand, the journalism experience of Lindsay-Schaub and its news gathering facilities brought an increase in the news and public affairs aspect of the broadcast stations' programming. All of this, and the 160 other situations of radio-newspaper cross-ownership established under Commission aegis and encouragement, was evaluated by the Commission, and the "grandfathering" provisions were fashioned in the rule making proceeding. For the court of appeals to say that against all this the Commission should adopt the rule that would give controlling weight (A. 431) to diversifying media outlet ownership in the remand proceedings, would foreclose the ..

Commission from any consideration of other public interest licensing factors, such as the all important one of service to the community.²⁰

The lower court sustained the Commission's prospective ban, and approved the principle underlying the FCC's limited divestiture order, and then used those approvals to find the Commission's determination not to require across-the-board divestiture as arbitrary and capricious (A. 418, 440, 443). But this use of the Commission's public interest conclusions in the rule making proceeding as to the future cannot save the error of the lower court's holding that those conclusions require divestiture as a matter of law.

The lower court's afterthought as to the extent of its direction to the Commission about divestiture, saying it ordered the result on remand only so "that everyone" (existing co-ownership as well as applicants for new facilities) "would be consistently treated under the standards..." of no co-ownership "adopted for new license applicants",²¹ does not obscure the error of directing a result and determining what rule the Commission should adopt on remand. The difference between a new applicant and a long established, Commission-encouraged "grandfather" situation, when supported by the record as it was here, is an administrative function of the agency. The court's direction to the contrary invaded the administrative

²⁰To implement the constitutionally permissible allocation tool of considering frequency assignments so as to "'render the best practical service to the community reached'", *National Broadcasting Co. v. U.S.*, *supra*.

²¹Contained in its per curiam opinion ordering the partial stay of mandate (A. 443).

function. *Federal Power Commission v. Idaho Power Co.*, *supra*, 344 U.S. at 20.

Prospective-only application of a Commission regulation, particularly in the field of regulations concerning broadcast ownership, is neither unknown nor "arbitrary and capricious" when unaccompanied by divestiture requirements. For example, in *United States v. Storer Broadcasting Co.*, *supra*, the limitation on the number of broadcast stations was upheld, and no divestiture requirements were imposed by this Court on the Commission in implementing the new regulations.²²

In this case, the court of appeals purported to assay the record before the Commission as insufficient to support the agency's "grandfathering" provisions, but only in terms of television and newspaper, while directing the Commission to include radio (AM and FM) broadcast stations in the across-the-board divestiture orders which should follow on remand. (See footnote 1 of the Court's opinion, A. 346-347). From what has been said before, it is apparent that the within petitioners believe that the reasoning and eventuating judgment of the court of appeals should be set aside because of the basic errors which affect it, applicable to all classes of broadcast stations. The reference to portions of the court's opinion which encompasses AM and FM stations in a direction to the agency in which only television stations (vis-a-vis newspapers) have been

²²Even in the present case, the FCC's broadcast-newspaper ownership rule commenced upon a premise of no divestiture in the TV-other broadcast, same-city ownership rule changes, which was not challenged below.

considered simply highlights, rather than distinguishes, the errors on the basis of applicability to AM or FM, on the one hand, and television on the other. The court's result is inconsistent with the approach the Commission has followed for many years in its broadcast ownership rules to take into account differences between and among AM and FM stations and television stations, and even between television stations on a VHF and UHF basis.²³

Finally, the provisions in the lower court's opinion that waiver procedures relative to divestiture would (have to) be incorporated by the Commission, hardly saves the direction for divestiture from invalidity. With a bow to this Court's *Storer* decision²⁴ that a bar is not absolute, and hence not fatal, if the Commission rules furnish an opportunity for waivers or exceptions, even in this area the lower court erred by directing a limited scope of any waiver consideration. The lower court's direction to the FCC is ambiguous at best. At one point the court marginally noted that "if it appeared likely that a newspaper would fail as a result of divestiture, the Commission could reasonably conclude that the public interest called for a waiver" (A. 426, footnote 104, citing *International Shoe Co. v. FTC*, 280 U.S. 291, 302-303 (1930). Elsewhere,

²³Such as the ownership rules approved by this Court in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), which on remand to the District of Columbia Circuit, saw the numerical limits established by the Commission sustained on the grounds that they were based on the Commission's experience "coupled with a design to avoid undue disruption of existing service". *Storer Broadcasting Co. v. U.S.*, 240 F.2d 55, 56 (1956).

²⁴*United States v. Storer Broadcasting*, 351 U.S. 192, *supra*.

however, it sternly stated that "the demise of marginally profitable newspapers contrary to the intent of the Newspaper Preservation Act²⁵ are little more than speculations" and not cognizable to defend against the court's desired across-the-board divestiture (A. 410), and "[p]rivate losses are a relevant concern under the Communications Act only when shown to have an adverse affect on the provisions of broadcasting service to the public". (A. 424).

In sum, the court of appeals has attempted to substitute its judgment for that of the Commission as to the relevant weight to be accorded diversity of ownership and other licensing policies in making the public interest judgments required of the Commission under the Comraunications Act. The errors in the court's opinion in going beyond the proper role of a reviewing court under Section 402(a) of the Communications Act, present the same need for reversal by this Court as in *Pottsville, supra*, and *Federal Power Commission v. Idaho Power Co., supra*.

²⁵P.L. 91-353, 84 Stat. 466 (1970).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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